

DECISION



25875 4/12/84
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-209940.6

DATE: July 28, 1983

MATTER OF: C.P.F. Underground Utility, Inc. and
Schweigert, Inc./Joint Venture

DIGEST:

1. Voluntary dismissal with prejudice of a complaint filed in United States District Court constitutes a final adjudication on the merits, barring further action by GAO on a protest involving the same issues.
2. Protest allegation that an IFB specification is unduly restrictive is untimely and not for consideration on the merits where the alleged restrictiveness was apparent on the face of the IFB, but the protest was not filed in GAO until after bid opening.

C.P.F. Underground Utility, Inc. and Schweigert, Inc./Joint Venture (CPF) protests the award of a contract to Hurst Excavating under invitation for bids (IFB) No. N62477-81-B-0408, issued by the Department of the Navy for rehabilitation of a steam distribution system at Andrews Air Force Base, Maryland. CPF contends that the solicitation was unduly restrictive because it called for installation of a qualified heat distribution system and no system supplier has been approved under the applicable prequalification procedures. It concludes that the solicitation should have been canceled. We dismiss the protest.

On June 21, 1983, prior to its filing this protest with our Office on June 29, CPF filed suit against the Navy in the United States District Court for the District of Columbia (Civil Action No. 83-1812). The grounds presented as the basis for that suit were the same as those on which this protest is based. On July 11, based on CPF's specific request filed with the court clerk, the court dismissed CPF's complaint with prejudice. The document filed with the court states that CPF was requesting dismissal with prejudice in return for an agreement by the Navy to withdraw a "technical defense" it had raised against consideration of the matter by our Office. The

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Navy had argued in a letter to our Office dated July 6 that we should dismiss the matter in accordance with our Bid Protest Procedures, which state that we will not review issues before a court of competent jurisdiction unless the court expresses interest in our decision. See 4 C.F.R. § 21.10 (1983).

A dismissal with prejudice by a court constitutes a final adjudication on the merits and bars further action by this Office. See Sea-Land Service, Inc., B-208690.2, February 10, 1983, 83-1 CPD 148. Although CPF's dismissal here was voluntary, it nonetheless operates as a final adjudication on the merits. See Fed. R. Civ. P. 41(a). Thus, we will not consider the merits of CPF's protest. The fact that CPF may have requested the dismissal based on some agreement with the Navy that our Office would consider the protest does not persuade us to take the contrary position. Our Office was neither party to nor aware of this agreement, and its existence does not constitute a basis for disregarding our established rules regarding dismissals with prejudice.

In any event, the protest is untimely. CPF previously protested to our Office on the grounds raised here, i.e., that the IFB was unduly restrictive and should be canceled due to the absence of any system suppliers with the requisite approval. We dismissed this earlier protest as untimely because it was based on an alleged defect on the face of the IFB but was not filed prior to bid opening as required under our Procedures, 4 C.F.R. § 21.2(b)(1). See C.P.F. Underground Utilities, Inc. and Schweigert, Inc./Joint Venture, B-209940.3, February 1, 1983, 83-1 CPD 112. After we issued this decision, counsel for the Navy advised us that it intended to cancel the solicitation for the reasons urged by CPF. Upon considering the matter further, however, the agency determined that cancellation was not justified and proceeded to award a contract to Hurst, the low bidder. Although CPF now casts its protest in the somewhat different light--that it was improper for the Navy not to cancel as it had intended--the ultimate or determinative question remains the same, that is, whether the IFB was unduly restrictive and thus had to be canceled. This issue remains untimely.

B-209940.6

The protest is dismissed.

Harry R. Van Cleve
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Acting General Counsel